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In the Supreme Court of the United States

October Term, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION
and ROBERT F. NICCUM,
Appellants,

vs.

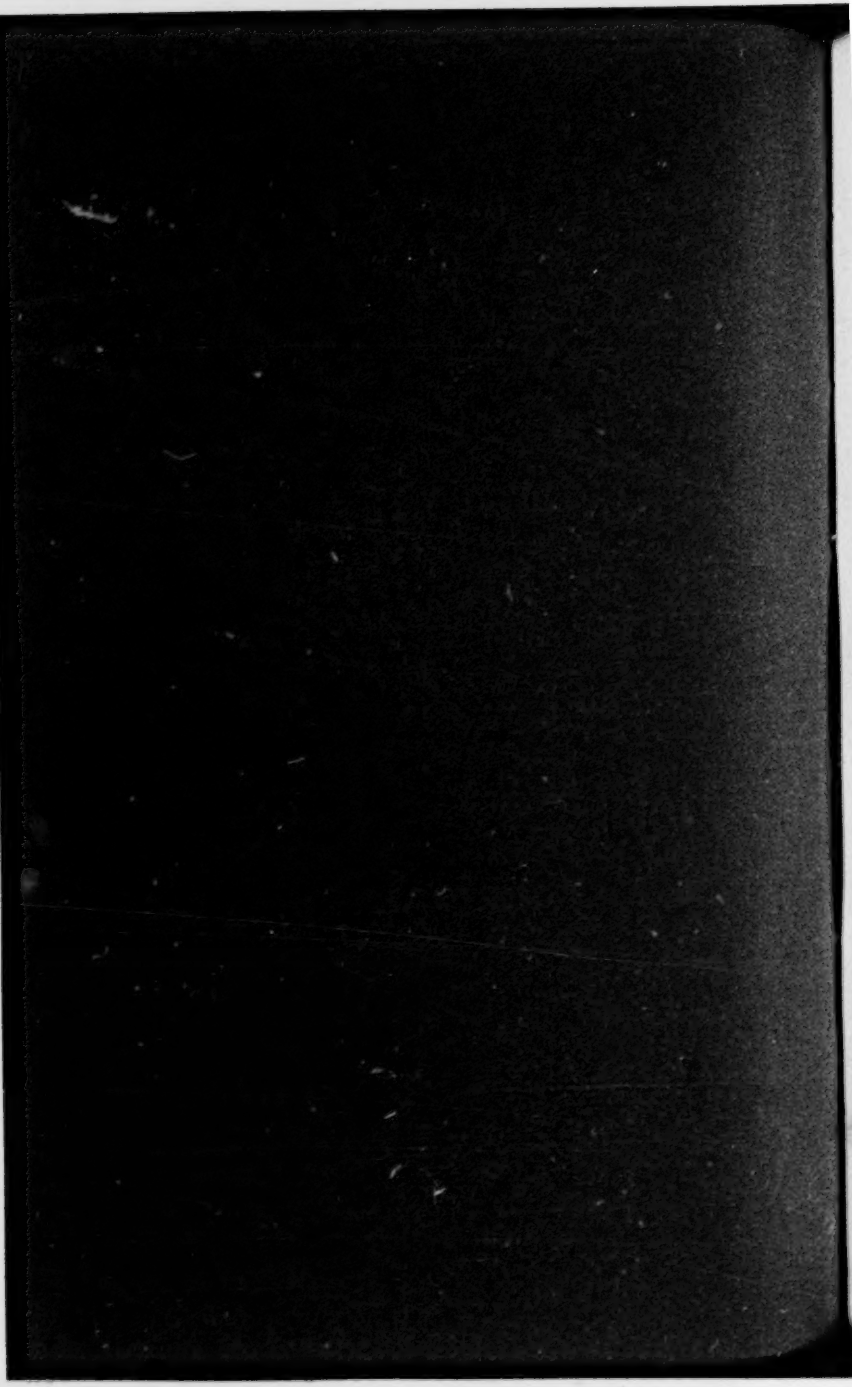
ARTHUR DAVIS, *et al.*,
Appellees.

On Appeal from the United States District Court
For the Northern District of Ohio,
Eastern Division

JURISDICTIONAL STATEMENT

Jack M. Schulman, Esq.
Schulman & Schulman
720 Standard Building
Cleveland, Ohio 44113
(216) 621-6500

Jonathan H. Rosen, Esq.
Rosen & Rosen
1161 Euclid Avenue
Cleveland, Ohio 44115
(216) [illegible]-2727
Counsel for Appellants



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In the Supreme Court of the United States

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No. .....

OHIO MUNICIPAL JUDGES ASSOCIATION
and ROBERT F. NICCUM,
Appellants,

vs.

ARTHUR DAVIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of a three-judge panel in the United States District Court for the Northern District of Ohio, Eastern Division. Said judgment denied declaratory relief to plaintiffs therein and dissolved that court's temporary restraining order and injunction, which had enjoined defendants from disturbing payment of "in-term" compensation increases being paid to plaintiff judges. Also enjoined by the said District Court were actions seeking to recover "in-term" increments previously paid to said judges, which in many instances involve amounts as high as twenty-five thousand dollars per judge.

Appellants believe the District Court below abused its discretion in failing to continue in effect its injunctive relief and in failing to provide permanent relief to appellants from state action which appellants believe to be violative of the Fourteenth Amendment to the Constitution of the United States.

The issues involved herein are of a substantial nature not because of monetary considerations alone, but because they relate directly and implicitly to the fundamental rights of equal justice for *all*, the very cornerstone of this nation's judicial system and government.

OPINION BELOW

The judgment and opinion of the United States District Court aforementioned is unreported at this time; the full text of same is, therefore, incorporated herein as Appendix "A".

Appellants respectfully request this Court to take particular notice of the following numbered paragraphs of the lower court's opinion, to wit: No. 12, 13, 14, 15, 16.

GROUNDS UPON WHICH JURISDICTION OF THIS SUPREME COURT OF THE UNITED STATES IS INVOKED

1. This suit was brought as an original action in the aforementioned United States District Court under Titles 28 U.S.C.A. 1331, 28 U.S.C.A. 1343, and 28 U.S.C.A. 2281. It is brought to this United States Supreme Court under Title 28 U.S.C.A. 1253.

2. Jurisdiction is further supported by this Court's consideration of such cases as *England v. Louisiana State Board,* 375 U.S. 411, *Government Employees v. Windsor,* 353 U.S. 364, and *Florida Lime and Avocado Growers Inc. v. Jacobson,* Cal., 362 U.S. 73.

3. By virtue of Article III, Section 2, of the Constitution of the United States, judicial power extends to all cases in law and equity arising under the Constitution. The claim herein arises under the Fourteenth Amendment to the Constitution of the United States, as well as probable involvement of Article IV, Section 4, of the Constitution of the United States.

DATE OF JUDGMENT SOUGHT TO BE REVIEWED

1. Final judgment of the United States District Court, Northern District of Ohio, Eastern Division, was entered on November 22, 1972 at 12:10 p.m.

2. Appellants' notice of appeal, following overruling by said court of a motion for rehearing, was filed with the clerk of said District Court on December 16, 1972 at 12:40 p.m., along with required deposit for costs.

STATE CONSTITUTIONAL PROVISION INVOLVED

1. Article IV, Section 6(B) of the Constitution of the State of Ohio, as amended on May 7, 1968. (See Appendix "B".)

QUESTIONS PRESENTED IN THIS APPEAL

1. Whether a United States District Court may abstain from adjudicating plaintiffs' claim of denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, merely by concluding that appropriate relief would result in leveling-off favored members of a class rather than conferring a direct benefit upon the disadvantaged and underincluded plaintiffs of the same general class.

2. Whether a state constitution may, consistent with the Fourteenth Amendment's guaranty of equal protection of the laws, single out municipal court judges from all other judges for denial of in-term increases in compensation, where said differential treatment has no rational basis for distinguishing between the members of the class of judges and where such discrimination is contrary to the purpose and intent of the amended state constitution.

3. Whether a United States District Court, in an original action, may abstain from adjudicating the merits of a claim of arbitrary, invidious classification and rest its judgment upon a state court opinion in a separate and distinct action wherein that state court fails to substantially and materially decide the legitimacy of the classification on the basis that it lacked jurisdiction to do so, but, nevertheless gratuitously predicts that if it had proper jurisdiction, it would find the classification legitimate.

4. Whether a state constitution which treats all judges in the state as a class, but without any reasonable, rational, substantial, or persuasive public interest, discriminates against one segment of the general class with respect to the right to receive increases in compensation

during term of office constitutes a violation of plaintiffs' rights under the Fourteenth Amendment to the Constitution of the United States.

5. Whether a state denies to its citizens the fundamental right afforded by Article IV, Section 4, of the Constitution of the United States, when such citizens by their unmistakable, unambiguous declaration in a referendum election directs the state to perform certain acts, which acts would not be inconsistent with either the constitution of the state nor of the Constitution of the United States and which acts the state fails and refuses to perform.

6. Whether a state may promote and adopt a program or scheme designed to improve its judicial system generally, but denies some of its citizens access to all facets of such improved judicial system, particularly those citizens compelled by law to adjudicate their claims or criminal charges in courts of the state which have been excluded from the full impact of the judicial improvement program, without a rational, substantial, or reasonable purpose.

STATEMENT OF THE CASE

1. After 171 years, the electorate of Ohio was persuaded to adopt a comprehensive amendment of Article IV, the judicial article, of its constitution, with the avowed purpose of modernizing and increasing the quality and efficiency of all of its courts of record.

2. One of the more prominent changes advocated was exemption of *judges* from the restrictions imposed by Article II, Section 20, of the constitution of the State of Ohio, which reads as follows:

"The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of officers; but no change therein shall affect the salary of any officer during his existing term unless the office be abolished."

3. In the referendum election held on May 7, 1968 the ballot upon which the electorate signified its adoption of the Amendment of Article IV, known popularly as the "Modern Courts Amendment", no distinctions were made as to applicability of exemption from the prohibitions of Article II, Section 20 as to any particular class of judge. The pertinent language read as follows:

"* * * to equalize *judges'* salaries and to allow increases in compensation during term * * *". (Emphasis added.)

The full text of the ballot language will be found in the lower court's memorandum opinion attached hereto.

4. In the drafting of a Joint Resolution of the General Assembly, which was enacted so as to present the constitutional amendment to the electorate, Section 6(B), the "compensation section," fails to mention the title of municipal court judge. In the District Court the testimony of the Honorable William W. Milligan, United States Attorney for the Southern District of Ohio, and the testimony of the Honorable John V. Corrigan, Justice of the Court of Appeals of Cuyahoga County, Ohio, established without contradiction that the absence of the title "municipal court judge" was an oversight and that it was not the intention of the General Assembly to exclude such judges from the benefits of Section 6(B). Mr. Milligan was co-chairman of the Ohio State Bar Association Modern Courts Committee which played the major role in proposing and

promoting the adoption of the constitutional amendment and testified to his thorough knowledge of the events leading up to the action of the General Assembly and the electorate. Justice John V. Corrigan at the time of the proposal to the General Assembly also participated most importantly as Chairman of the Ohio Judicial Conference.

5. Following adoption of the amendment in May, 1968, several general trial courts in the state, several state appellate courts, and an official opinion of the Attorney-General, held that municipal court judges were among the class of judges exempted from the restrictions of the aforementioned Article II, Section 20, and were as a result of the "Modern Courts Amendment" *"cases provided for in the Constitution"* entitled to receive increases in compensation during term of office.

6. Early in 1972, after most of the approximately 170 municipal court judges had received increased compensation by virtue of a new schedule of compensation enacted June 10, 1968, the court of appeals of Mercer County, Ohio, handed down an opinion contrary to the other court of appeals decisions and the issue perforce came before the supreme court of Ohio.

7. The supreme court of Ohio on March 1, 1972, in an opinion written by the Chief Justice of said Court, construed Article IV, Section 6(B) to be applicable in *all respects* to municipal court judges, but *not with respect* to exemption from the change of salary restriction of Article II, Section 20, since the title "municipal court judge" did not appear in Section 6(B).

8. The case in which the supreme court of Ohio rendered its interpretation is known as *The State ex rel. Wallace, Judge, Celina Municipal Court, Appellant v.*

City of Celina, et al., Appellees, 29 Ohio St. 2d 109, 279 N.E.2d 866. Interpretation of Article IV, Section 6(B) was the only issue brought before the state court and its decision, as a matter of law in Ohio, is confined to that single issue by virtue of Ohio's long-standing practice and rule that the syllabi of a decision of the supreme court, unless per curiam, controls the law of the case. This United States Supreme Court has had occasion to be confronted with that Ohio practice in *Beck v. Ohio* (1964), 379 U.S. 89 at page 93, footnote No. 2, which reads:

> "For more than 100 years the rule in Ohio has been that its Supreme Court except for per curiam opinions, speaks as a court only through the syllabi of its cases. * * *."

9. In the course of writing his opinion, however, the Chief Justice alluded to the question of whether the issue of "equal protection" was involved in the case before the court. The language used was as follows:

> "This brings us to relator's argument in relation to equal protection. It does not appear in the record that this argument was raised in the Court of Appeals. Although relator asserts that it was raised in oral argument therein, it is not discussed in the opinion of that court.
>
> "In Toledo v. Reasonover (1965), 5 Ohio St. 2d 22, it was held that this court '* * * will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court.' Paragraph five of the syllabus in Winslow v. Ohio Bus Line Co. (1947), 148 Ohio St. 101, reads, in part: '* * * *this court may not pass upon any question unless the record certified to this court by the Court of Appeals discloses that such*

question was presented to and passed upon by that court.' Thus, the court is not required to pass upon that question.

"In any event, the court is of the opinion that there are sufficient *differences between the courts* enumerated in Section 6(B) and Municipal Courts to authorize their separate classification without abridging the equal protection clause of the Fourteenth Amendment. * * *". (Emphasis added.)

10. The foregoing statement of the Ohio supreme court is not dispositive of the issue of equal protection for the reasons cited by that court itself in addition to the fact that no reference to the issue is contained in the syllabi. It is, if anything, dispositive of the fact that *courts* may be classified, a totally unrelated matter. That "courts" and "judges" are not synonymous is well known to Ohio law as stated in *State ex rel. Hawke v. LeBlond,* (1923) 108 Ohio St. 126 at page 132:

"It cannot be doubted that by these statutes the Ohio Legislature has recognized the distinction between courts and judges * * * * *. The Court is a tribunal organized for the purpose of administering justice, while the judge is the officer who presides over that tribunal.

"The terms 'court' and 'judge' are sometimes used interchangeably and synonymously, but they are never technically the same in meaning." (See also Todd v. United States (1894) 158 U.S. 278, at page 284.)

11. Appellants, with exception of Judge Wallace as a member of the class, were not parties to the aforementioned *Wallace v. Celina* case, and, therefore, brought the

instant action in the United States District Court to achieve determination of the substantial issue of whether Article IV, Section 6(B) is inconsistent with the protections guaranteed under the Fourteenth Amendment to the Constitution of the United States.

12. The United States District Court below, however, avoided the Constitutional issue on the ground that it saw only one means of treating plaintiffs and other judges equally, but such treatment would result in the advantaged class of judges to lose their advantage and afford no monetary benefit to the plaintiffs. No discussion or consideration is indicated in the opinion as to whether the classification is unreasonable, arbitrary, discriminatory or bears a relation to the object and purpose of the legislation, thus leaving the issue in limbo not only to the detriment of the citizens of Ohio, but to those of any other state in the Union contemplating judicial reform programs.

13. The District Court below was in error also, appellants believe, in failing to recognize its power to correct the discriminatory provisions of Article IV, Section 6(B) as indicated by this Court in *Welsh v. United States* (1970), 398 U.S. 333, wherein this Court stated in part:

> "Where a statute is defective because of underinclusion there exists two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion."

14. In the United States District Court below not a shred of evidence was introduced to indicate that the discrimination against municipal court judges was based upon

any rational, substantial basis in furtherance of the objects and purposes of the legislation in question.

CONCLUSION

1. The issues and questions of law present in this case are, appellants believe, of a substantial nature having import far beyond the borders of the state of Ohio. Many states have adopted new court and judicial structures; others, New York State for example, are in the process of doing so and the subject of court reform is one of wide public interest and concern throughout these United States.

2. Of particular concern is improvement of courts of limited jurisdiction or first jurisdiction, such as municipal courts. This Court has recently noted its concern in such cases as *Argersinger v. Hamlin*, 92 Supreme Court Reporter 2006, at page 2011, where the Court describing conditions in the lower courts said:

> " 'Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.' "

3. The discriminatory practice complained of in this case is directly and importantly related to helping to cure those "basic ills" referred to by the Court.

4. Appellants acknowledge that there are numerous instances wherein states are permitted to make classifications which for one reason or another do not encompass every evil contemplated in the legislative scope. We do insist, however, that no such logic may be countenanced

with respect to the subject of justice in a nation which proclaims "Liberty and *Justice for All*".

Respectfully submitted,

JACK M SCHULMAN
SCHULMAN & SCHULMAN
730 Standard Building
Cleveland, Ohio 44113

JONATHAN S. ROCKER
REDDY & ROCKER
1101 Euclid Avenue
Cleveland, Ohio 44115
Counsel for Appellants

APPENDIX A

Opinion and Order of District Court

No. C 72-532

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO MUNICIPAL JUDGES ASSOCIATION, *et al.*,
Plaintiffs,

vs.

ARTHUR DAVIS, *et al.*,
Defendants,

and

RICHARD L. DITTO, *et al.*,
New Party Defendants.

MEMORANDUM OPINION AND ORDER

BEFORE: WEICK, *Circuit Judge;* GREEN, *District Judge;* and CONTIE, *District Judge.*

CONTIE, *D.J.*

This cause came on to be heard on the complaint of plaintiffs, the Ohio Municipal Judges Association; and Robert F. Niccum, who is a duly elected municipal judge in the City of Euclid; and the answer of defendants, Arthur Davis, Director of Finance, City of Euclid; George M. Voinovich, Cuyahoga County Auditor; and Joseph T. Fer-

guson, State Auditor; wherein plaintiffs requested the Court to make certain orders relative to Article IV, §6(B) of the Ohio Constitution, and alleges that the same is in conflict with the United States Constitution.

After the commencement of the action, the Court granted leave to the Cuyahoga County Bar Association to become a party plaintiff; and granted leave to Richard L. Ditto, County Auditor of Allen County, to become a party defendant. The Court further permitted Edward Ward, Finance Director of the City of Lima, Ohio, to become a party defendant.

The complaint alleges jurisdiction under Title 28, USC §§1331, 1343, and 2281 and further alleges that the amount in controversy exceeds the sum of $10,000.00, exclusive of costs and interest.

The Court made a determination that the within action was a class action in accordance with Rule 23, F.R.Civ.P., the members of the class being all individuals presently serving as municipal judges in the State of Ohio as well as all individuals who are not presently serving as municipal judges in the State of Ohio but who have served as municipal judges at any time between May 2, 1968, and the date of the order. The Court directed that notices be sent to the members of the class by the plaintiffs in accordance with Rule 23, together with notification that members of the class could file requests for exclusion. A request for exclusion was filed by Reed M. Winegardner of Fayette County; Harry Vanberg, Akron Municipal Court; and R. K. Wilson, Piqua Municipal Court.

The prayer of the complaint is as follows:

"A. That a three-judge panel be convened pursuant to Title 28, USCA §2281 to hear and determine the issues in this cause;

B. That the Attorney General of Ohio and the Governor of Ohio be notified of the pendency of this action;

C. That a temporary restraining order be issued by a single judge of this Court, pending a hearing by the three-judge panel; that upon the convening of a three-judge panel a preliminary injunction be issued pending final disposition of this cause; and that upon final hearing of this cause a permanent injunction be issued, all of which injunctions would restrain and enjoin the defendants, their agents, and employees and those in active concert with them from refusing compensation to any municipal judge, except pursuant to §1901.11 O.R.C. (enacted June 10, 1968), and from attempting or endeavoring to secure return of any sums already paid to the plaintiff, Niccum, and the members of the classes which he represents;

D. For a declaration of the rights, status and liability of the parties; for a declaration that Article IV, §6(B) of the Ohio Constitution is in conflict with the Fourteenth Amendment to the United States Constitution and constitutes a denial of equal protection of the law, and due process of law to all municipal judges of the State of Ohio within the classes represented by the plaintiffs; and

E. For such other relief as the Court shall deem just and proper, including costs herein."

The prayer was subsequently amended with leave of the Court to add the following paragraph:

"D(1) That the Court order the defendants to compensate all plaintiffs and all members of the class they represent in accordance with any salary increases

specified or enacted during their respective terms of office, and enjoin the defendants from refusing compensation to the plaintiffs and those members of the class they represent in accordance with any salary increases specified or enacted during their respective terms of office."

Answers were duly filed by the respective defendants. The following stipulations were entered into by and between the parties prior to oral argument:

"1. Defendant Arthur Davis, Finance Director, City of Euclid, Ohio, stipulates that with regard to plaintiff, Robert F. Niccum, the amount in controversy exceeds Ten Thousand and no/100 Dollars ($10,000.00), exclusive of costs and interests.

2. The Ohio Municipal Judges Association is an unincorporated association, duly organized and existing under the laws of the State of Ohio. Its general purpose is to act for the benefit of the municipal judges of the State of Ohio, to represent their joint interests and to promote improvement in the administration of justice in the municipal courts. There are approximately One Hundred Seventy (170) members of the Association, and the Association brings this action on its own behalf and on behalf of its members. .

3. Robert F. Niccum is the duly elected municipal judge in the City of Euclid, Ohio. He was elected to his present term on January 1, 1970, and said term is for a period of six (6) years.

4. The plaintiff, Niccum, brings this action on his own behalf and on behalf of the following classes of individuals.

a) All individuals presently serving as municipal judges in the State of Ohio; and

b) All individuals who are not presently serving as municipal judges in the State of Ohio, but who have served as municipal judges at any time between May 2, 1968, and the present date.

5. Mr. Arthur Davis is the duly appointed and acting Finance Director of the City of Euclid, Ohio. Edward Ward is the duly elected and acting Finance Director of the City of Lima, Ohio. It is their responsibility and duty to pay the various officials and employees of the cities of Euclid and Lima, respectively, including the plaintiffs, Niccum and Andrews, the salaries and compensation to which they are entitled by law. The compensation which the plaintiffs, Niccum and Andrews, receive for the performance of their duties as municipal judge of the City of Euclid and Lima, respectively, is paid in part by funds from the cities of Euclid and Lima, which the defendants, Davis and Ward, are obligated to disburse.

6. The defendant, George M. Voinovich, is the duly appointed and acting County Auditor of Cuyahoga County, Ohio. The defendant, Richard L. Ditto, is the duly elected and acting Auditor of Allen County, Ohio. The compensation which the plaintiffs, Niccum and Andrews, receive for the performance of their duties as municipal judge is paid in part from funds belonging to Cuyahoga and Allen Counties. The defendants, Voinovich and Ditto, have the duty and obligation as County Auditor to pay plaintiffs, Niccum and Andrews, the compensation to which they are entitled by law.

7. The defendant, Joseph T. Ferguson, is the duly elected State Auditor of Ohio. Part of his responsibilities and duties as State Auditor include the supervision of the various cities and counties of Ohio in their financial operation. Among these responsibilities, Mr. Ferguson instructs the various counties and cities as to the legal and proper expenditure of their funds. Among the expenditures which he directs and oversees is the responsibility of the defendant, Davis, and the defendant, Voinovich, to pay the lawful and proper judge's compensation to the plaintiff, Niccum, and to those classes represented by the plaintiffs.

8. On or about May 7, 1968, the State of Ohio by referendum vote adopted Article IV, §6(B) of the Ohio Constitution, which provides in part as follows:

> "The judges of the Supreme Court, Court of Appeals, and of the Courts of Common Pleas shall at stated times receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office. . ."

9. On or about June 10, 1968, the Legislature of the State of Ohio enacted §141.04 O.R.C. which provided a new schedule of compensation for judges of the Supreme Court, Courts of Appeals, and Courts of Common Pleas.

10. On or about June 10, 1968, the Legislature also enacted §1901.11 O.R.C., which provided a new and different compensation schedule for municipal judges.

11. Article II, §20 of the Ohio Constitution provides:

"The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of officers; but no change therein shall affect the salary of any officer during his existing term unless the office be abolished."

12. As so construed, the Ohio Constitution creates a distinction between judges of the Supreme Court, the Courts of Appeals, and the Common Pleas Courts on the one hand, and municipal judges and county judges on the other hand. As construed by the Ohio Supreme Court, the Ohio Constitution allows for increases of salary during term for Supreme Court, Courts of Appeals, and Common Pleas judges but prohibits increases in salary during the term to municipal judges and county judges.

13. Some Municipal Courts have county-wide jurisdiction, the same as all Common Pleas Courts.

14. Municipal Courts have concurrent jurisdiction with Common Pleas Courts in some cases.

15(a) The following provisions of Article IV, §6, Ohio Constitution, apply to *all* judges in the State of Ohio, including *Municipal Court judges*.

1. Terms of office begin on days fixed by law; applicable to *all* judges. Terms of office are all six years.

2. Times and mode of election of *all* judges are set according to laws enacted therefor.

3. *All* judges are prohibited from receiving any fees or perquisites.

4. *All* judges are prohibited from holding any other office of profit or trust, under the authority of the State or the United States.

5. All votes for *any* judge, for *any* office, except for a judicial office are void.

6. *All* judges are barred from election if they attain the age of 70 years before the date on which they take office.

7. *All* judges who retire voluntarily or because of restriction against re-election are eligible for assignment to active duty.

8. *All* judges who accept assignments after retirement are paid on a per diem basis; no restriction as to increase in rate of compensation to any such assigned judge.

9. *All* judges who serve by assignment after retirement receive the per diem compensation in addition to any retirement benefits received.

16. The amendment to Article IV, Ohio Constitution, appeared on the ballot as follows:

'PROPOSED CONSTITUTIONAL AMENDMENT
ADMINISTRATION AND ORGANIZATION OF OHIO JUDICIAL SYSTEM

(Proposed by Resolution of the General Assembly of Ohio)

A majority affirmative vote is necessary for passage.

Shall the Constitution of the State of Ohio be amended by Amending Sections 1 and 2, Enacting Sections 3, 4, 5, and 6, and Repealing Existing Sections 3, 4, 6, 7, 8, 10, 12, and 14 of Article IV and by Repealing Sections 12 and 13 of Article II as adopted in 1851 to provide that the Supreme Court shall decide all cases by majority vote, to fix the power of the Supreme Court of Ohio to exercise

administrative supervision over all courts and to make rules of practice and procedure, to prohibit the election or appointment to any judicial office of a person who shall have passed the age of 70 years, *to equalize judges' salaries and to allow increases in compensation during term,* to remove the Probate Court, as a Constitutional Court and to authorize the consolidation of County Probate Courts and Courts of Common Pleas?" (Emphasis supplied.)

17. The defendant, Joseph T. Ferguson, has instructed all county and municipal fiscal officers to discontinue payment of the compensation specified in §1901.11 O.R.C. to municipal judges who were elected to office prior to June 10, 1968, and to municipal judges whose salaries have been increased during their term of office. Unless restrained by this Court, the defendants, Davis, Ward, Ditto, and Voinovich, together with all other fiscal officers of the counties and municipalities in the State of Ohio will refuse compensation to the plaintiffs, Niccum and Andrews, and to the classes represented by the plaintiffs as those rates of compensation are specified in §1901.11 O.R.C. Further, the defendants will seek to recover sums paid to the plaintiffs, Niccum and Andrews, which are in excess of the salary schedule specified in the predecessor to §1901.11 O.R.C.

18. Prior to the adoption of Article IV, §6(B) of the Ohio Constitution on May 7, 1968, all judges were prohibited from receiving in term salary increases."

Article IV, §6(B) has been subject to review by the Ohio Supreme Court in *Ex rel Wallace, Judge, Celina Municipal Court v. City of Celina*, 29 Ohio St. 2d 109 (1972). Therein, the Ohio Supreme Court construed

Article IV, §6(B) as not including municipal judges within its scope, and denied plaintiff a writ directing the respondent City Council to make an appropriation for additional salary. Syllabus two of the *Wallace* decision reads:

> "The language of Section 6(B) of Article IV of the Ohio Constitution relating to the compensation of judges for their services as judges of the Supreme Court, Courts of Appeals and Courts of Common Pleas is explicit. That language does not include, nor does it apply to, Municipal Court judges."

Plaintiffs contend that the Ohio Supreme Court did not consider the equal protection issue raised in this action. This Court has thoroughly read the *Wallace* decision, and cannot agree with that contention. The Ohio Supreme Court specifically addressed itself to the equal protection clause as follows:

> This brings us to relator's argument in relation to equal protection. It does not appear in the record that this argument was raised in the Court of Appeals. Although relator asserts that it was raised in oral argument therein, it is not discussed in the opinion of that court.
>
> • • • • •
>
> In any event, the court is of the opinion that there are sufficient differences between the courts enumerated in Section 6(B) and Municipal Courts to authorize their separate classification without abridging the equal protection clause of the Fourteenth Amendment. *Id*, at p. 113

This Court, in determining the issues before it is bound to apply the construction applied to Article IV, §6

(B) by the Ohio Supreme Court. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1941); *Madden v. Commonwealth of Kentucky*, 309 U.S. 83 (1940).

It is well settled that in an action presenting a constitutional attack on state laws the federal courts should abstain from reaching the constitutional issues if there are alternative grounds for decision. *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 269 (1969); *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *Tower Realty v. City of East Detroit*, 196 F. 2d 710 (CA 6, 1952). One policy served by that practice is that of not passing on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues. *Government and Civil Employees Organizing Committee, CIO v. Windsor*, 353 U.S. 364 (1957).

In this action the primary relief sought by plaintiffs is an order that municipal judges be compensated in a manner which would recognize in-term salary increases previously granted to them. In order to achieve that end plaintiffs attack Article IV, §6(B) as denying them equal protection under the laws.

The difficulty with plaintiffs' position is that Article IV, §6(B) created a limited exemption from the operation of Article II, §20 of the Ohio Constitution. If that exemption was found to violate the Fourteenth Amendment to the United States Constitution, this Court would be unable to grant to plaintiffs the right to in-term salary increases. A holding invalidating Article IV, §6(B) would result in all Ohio judges being subject to Article II, §20 rather than municipal judges being included in Article IV, §6(B).

This inability to grant to plaintiffs the primary relief sought, even if they should be correct on their con-

stitutional claim, requires dismissal of the complaint without the necessity of deciding the constitutional issue. Plaintiffs' argument that relief could be afforded to them by construing Article IV, §6(B) as including municipal judges is concluded by the controlling contrary construction of that provision by the Ohio Supreme Court.

This Court is in sympathy with all Ohio municipal judges who were excluded by the enactment of Article IV, §6(B) of the Ohio Constitution. However, as stated above, the language of the amendment is clear and unequivocal; and this Court has no authority to add to said Article. This Court finds that the actions of Joseph T. Ferguson, wherein he directed that Municipal Court judges be barred from any increases during their term, were proper and within the authority of Article II, §20 of the Ohio Constitution.

The temporary restraining order heretofore issued by this Court is hereby dissolved, and this case is dismissed. Costs assessed to plaintiffs.

IT IS SO ORDERED.

/s/ PAUL C. WEICK
U. S. Circuit Judge

/s/ BEN C. GREEN
U. S. District Judge

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

GREEN, *J.*, Concurring:

There were certain matters argued by plaintiffs in the course of these proceedings which I believe warrant some consideration.

Plaintiffs presented a number of affidavits from members of the legislature and from persons who were active in the promotion of the constitutional amendment indicating that it was the intention of the legislature, at the time of submission of this amendment to the voters, to include all judges within its scope. Plaintiffs point out that the wording of the issue upon the Ohio ballots was such that the voters could reasonably interpret the proposal before them as allowing in-term increases to all judges in the state.

Based upon those factors, plaintiffs argued that this Court should construe Article IV, §6(B) so as to effectuate the legislative intent and bring municipal judges within its protection. Unfortunately, under the controlling law as set forth in the principal opinion, this Court cannot do so, even though it may be possible that the amendment in the form in which it appeared on the ballots was misleading to the voters of Ohio and inconsistent with the understanding of many members of the legislature. It appears that under these circumstances, the only avenue open to remedy the failure of the constitutional amendment to reflect the legislative intent lies with the legislature itself.

There is, in my opinion, another problem presented in this litigation.

On the same date (subsequent to the enactment of Article IV, §6(B)) that the legislature enacted a new compensation schedule for judges of the Supreme Court, Courts of Appeals and Courts of Common Pleas, the legislature also enacted a revised compensation schedule for municipal judges. Thereafter, a decision was rendered by the Common Pleas Court of Franklin County, *Young v. Price*, Case No. 263,620, August 5, 1969, holding that

municipal judges were entitled to in-term increases in accordance with the new schedule. On April 17, 1970, the Attorney General of Ohio rendered an opinion, No. 70-046, that municipal judges could receive in-term increases. Based upon those authorities, many municipalities granted increases to judges serving upon the municipal bench. The Ohio Supreme Court's decision in *Wallace v. City of Celina*, 29 Ohio St. 2d 109 (1972), was the first authority holding that municipal judges could not receive the same benefit conferred upon other judges in the State of Ohio.

It was represented by plaintiffs that, if relief was denied them, not only would their salaries be reduced from the present levels, but that steps would also be taken to recover alleged excess payments previously made. In some instances this could be a substantial amount, working a hardship on the judge concerned. I believe that the Court's ruling in this case, being restricted to the legal issues discussed in the principal opinion and in this concurrence, has no bearing on the question of the plaintiffs' liability to repay monies previously paid to them. That issue was not before this Court. There may be substantial considerations relevant to this question in addition to the constitutional issue posed and passed upon in this forum.

/s/ BEN C. GREEN

United States District Judge

APPENDIX B

Constitution of the State of Ohio, Art. IV, 6

6. Election of justices and judges; compensation; assignment of retired judge to active duty.

(A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas shall be elected by the electors of the counties in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas shall reside during his term of office in the county in which his court is located.

(4) Terms of office of *all* judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election. (Emphasis added.)

(B) The judges of the supreme court, courts of appeals, and of the courts of common pleas, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void. (Emphasis added)

(C) No person shall be elected or appointed to *any judicial* office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. *Any* voluntarily retired judge, or *any* judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for *judges*. (Enacted by 132 v HR 42, eff. 5-7-68) (Emphasis added.)

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In the Supreme Court of the United States

October Term, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

vs.

ARTHUR L. DAVIS, *et al.*

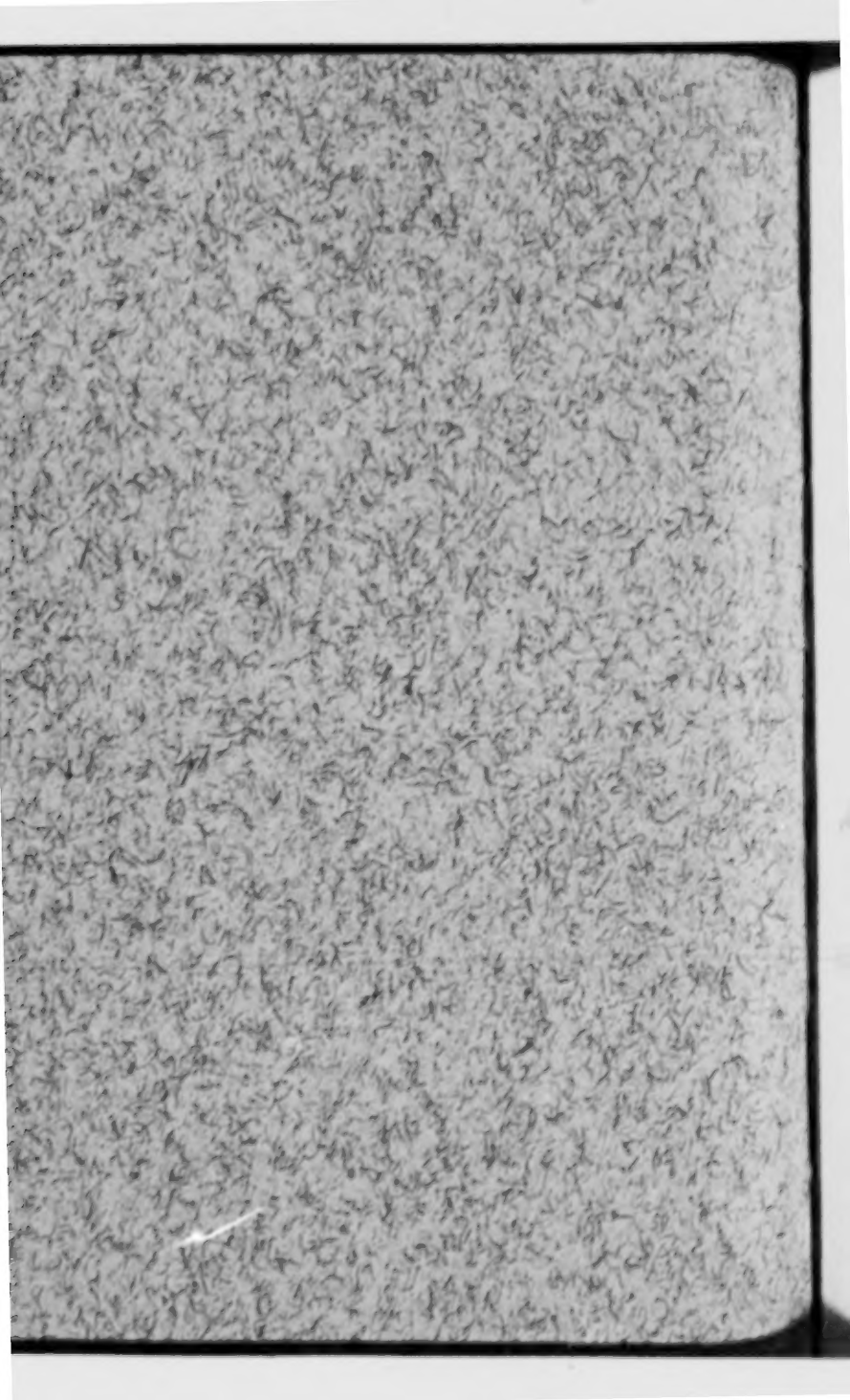
and

RICHARD L. DITTO, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

LAWRENCE S. HUFFMAN
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 227-3423
Counsel for Appellee, Richard L. Ditto



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In the Supreme Court of the United States

October Term, 1972

No. .....

OHIO MUNICIPAL JUDGES ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

vs.

ARTHUR L. DAVIS, *et al.*

and

RICHARD L. DITTO, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss the appeal herein on the grounds that it does not present a substantial federal question and the judgment rests on an adequate non-federal basis, OR IN THE ALTERNATIVE, to affirm the judgment of a three-judge panel in the United States District Court for the Northern District of Ohio, Eastern Division on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Appellees believe the District Court below did not abuse its discretion in dismissing appellants' complaint for lack of jurisdiction over the subject matter of the suit because the complaint did not present a substantial federal question. The issue in the present case is not only uniquely narrow, but the law regarding "standing" and "requisite federal question" firmly established as well. No amount of speculative contention or strained semantics should warrant further argument on a matter not only already properly adjudicated upon the authority of nearly two hundred years precedence, but a matter which affects a very small class of Ohio judges who simply take issue with the Ohio Legislature because a contrary legislative intent might have benefited them in a monetary manner.

I.

OPINION BELOW

The judgment and opinion of the United States District Court aforementioned is unreported at this time; the full text of the opinion is therefore, found in the Appendix of Appellants' Jurisdictional Statement.

II.

THE STATE CONSTITUTIONAL PROVISION INVOLVED AND THE NATURE OF THE CASE

1. On May 7, 1968, the State of Ohio by referendum vote adopted Article IV, Section 6(B) of the Ohio Constitution. It provides as follows:

"The judges of the Supreme Court, Court of Appeals, and of the Courts of Common Pleas shall at stated

times receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office . . . ."

2. The purpose of this amendment was to exempt judges of Ohio's constitutionally created courts (exclusively and solely those courts mentioned in the amendment) from the restrictions imposed by Article II, Section 20, of the Constitution of the State of Ohio, which reads as follows:

"The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of officers; but no change therein shall effect the salary of any officer during his existing term unless the office be abolished."

3. Thereafter, on June 10, 1968, the legislature of the State of Ohio enacted Section 141.04, Ohio Revised Code (incorporated herein as Appendix "A"), which provided a new schedule of compensation for judges of the Supreme Court, Courts of Appeals, and Courts of Common Pleas.

4. On the same June 10, 1968, the legislature also enacted Section 1901.11, Ohio Revised Code (incorporated herein as Appendix "B") which provided a separate and distinct compensation schedule for Municipal judges.

5. After the enactment of Section 1901.11, O.R.C., mentioned above, the legislative authorities of the various municipal corporations and the Boards of County Commissioners of the various counties were in a quandry regarding requests from Municipal Court judges for legislation implementing the salary increase. A decision by a general trial court in Franklin County, Ohio, held that the provisions of Article IV, Section 6(B) removed Mu-

nicipal Court judges from the prohibition of salary increases during their term.

6. As appellants well know, that general trial court's decision was legally binding only in that respective county. Furthermore, appellants obviously failed to mention in their Jurisdictional Statement (paragraph 5) that subsequent decisions by other general trial courts, as well as the opinion rendered by the Attorney General for the State of Ohio, were based solely upon the erroneous Franklin County decision, which they cited as authority for salary increases to several Municipal Court judges.

7. However, on March 1, 1972, the Supreme Court of Ohio in *Wallace v. Celina,* 29 Ohio St. 2d 109, 279 N.E.2d 866, held that the amendment of Article IV, Section 6(B) of the Ohio Constitution applied solely to Supreme Court judges, Courts of Appeal judges and Common Pleas Court judges.

8. The same court in the same decision also held that Article II, Section 20 of the Ohio Constitution is still applicable to Municipal Court judges and county judges. Thus, *Wallace v. Celina, supra,* established as the law of Ohio the following propositions:

a. Under the provisions of Article II, Section 20 of the Ohio Constitution, the salary of a Municipal Court judge may not be increased during his term of office.

b. The language of Section 6(B) of Article IV of the Ohio Constitution is explicit in that it does not include nor does it apply to Municipal Court judges.

c. Section 6(B) of Article IV of the Ohio Constitution has no effect upon Section 20 of Article II

of the Ohio Constitution in the application of Section 20 of Article II to Municipal Court judges.

9. The practical effect of the decision above was twofold: First, it prohibited any in term salary changes (increases or decreases) for Municipal Court judges, and for judges of any other *legislatively created courts,* because of the continued application of Article II, Section 20; Secondly, it permitted in term salary increases solely for judges of Ohio's *constitutionally created courts,* to wit: judges of the Supreme Court, Appellate Courts, and Courts of Common Pleas, because of Article IV, Section 6(B) which specifically mentioned them therein.

10. Thereafter, the plaintiffs-appellants, Ohio Municipal Judges Association, instituted this suit as a class action in the United States District Court for the Northern District of Ohio, Eastern Division, upon the allegation that Article IV, Section 6(B) is in conflict with the Fourteenth Amendment to the United States Constitution and constitutes a denial of equal protection of the law.

11. The District Court dismissed the complaint and denied appellants relief on the ground that plaintiffs did not present a substantial federal question, while stating that "the Ohio Supreme Court specifically addressed itself to the equal protection clause" of the Constitution of the United States, and that therefore they were "bound to apply the construction applied to Article IV, Section 6(B) by the Ohio Supreme Court," that such construction having been given by the Ohio Supreme Court as the controlling construction, and because "the language of the amendment is clear and unequivocal," they had "no authority to add to said Article."

III.

QUESTION PRESENTED IN THIS APPEAL

Whether or not the three-judge panel of the Federal District Court abused its discretion by dismissing the appellants' complaint prior to deciding the constitutional issue on its merits, on the basis that appellants' complaint did not present a substantial federal question.

IV.

THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

1. From the very beginning of this suit, appellants' sole motive for alleging a constitutional issue has been to seek the jurisdiction of a federal court for a purpose prohibited by law. This prohibition was enunciated by Justice Frankfurter who delivered the opinion of this Supreme Court in *Kesler v. Dept. of Public Safety of Utah*, 369 U.S. 153, 157, 82 S. Ct. 807 (1962). The opinion in pertinent part is as follows:

> "If an immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement (Title 28, §2281) does not become operative."

The appellants herein attempted to raise a constitutional issue solely for the purpose of seeking a new construction of Article IV, §6(B) of the Ohio Constitution through "judicial legislation" in a Federal Court, to include Municipal judges, contrary to that Amendment's meaning as stated by the Ohio Supreme Court. Simply

stated, appellant sought not an abrogation of an unconstitutional state law, but a new construction of that state law by a three-judge panel in Federal District Court. In accordance with your decision in *Kesler v. Dept. of Public Safety of Utah, supra,* seeking the respective federal forum for such purpose is clearly prohibited.

2. There were several factors which promulgated appellants' prohibited act. First, appellants well knew that the State of Ohio's authority to terminate illegally paid in-term salary increases to Municipal judges was based solely upon Article II, §20 of the Ohio Constitution, which has prohibited the same for 171 years. Nevertheless, attempting to employ procedural chicanery, they alleged in the District Court that "injury" was due to the enforcement of Article IV, §6(B) rather than Article II, §20. Secondly, appellants also well knew that Article II, §20 does not transgress the United States Constitution, and that the Supreme Court of Ohio not only upheld Article IV, §6 (B), but also gave effect to the Ohio Legislature's clear and unambiguous intent to exclude Municipal judges of those *legislatively created courts* from the impact of Article IV, §6(B), which applies solely to judges of *constitutionally* created courts, to wit, those clearly and unambiguously stated therein.

3. With full knowledge of these circumstances, appellants desperately sought a federal forum, in hope that by tiptoeing through a semantical playground they might sow an issue which might reap a few dollars; that by frivolously alleging a denial of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States that, per chance, the District Court might not discover that their real purpose for seeking that forum was federal legislation and not constitutional abrogation.

4. Such was not the case, however, as the astute panel of judges in the District Court below clearly saw the frivolous nature of appellants' constitutional allegation. Their memorandum opinion stated in part as follows, unequivocally demonstrates the definiteness of that Court's conclusions:

> "Plaintiffs contend that the Ohio Supreme Court did not consider the equal protection issue raised in this action. *This Court has thoroughly read the Wallace decision and cannot agree with that contention. The Ohio Supreme Court specifically addressed itself to the equal protection clause . . . .*"

5. It is clear that the District Court did not abuse the discretion by dismissing appellants' complaint upon the basis that the constitutional allegation was so insubstantial as not to need further consideration. Indeed, the District Court was faithfully following the decision of this Supreme Court in the *Kesler* case, *supra*. For this reason, appellees respectfully request affirmation of the decision, or in the alternative, a dismissal of appellants' appeal.

6. Secondly, the case at hand presents no substantial question not previously decided by this Court because the District Court abstained from adjudicating the merits of a claim that Article IV, §6(B) denies appellants' equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, on the basis that the Ohio Supreme Court had already considered the issue and had given the controlling construction.

7. Appellants assert that the Federal District Court abused its discretion by refraining from considering in detail the merits of Ohio's classification scheme. As we have already seen, the District Court was firmly convinced

that the Ohio Supreme Court had considered such with respect to the equal protection clause of the Fourteenth Amendment.

8. There is absolutely no doubt that the Federal District Court was correct in refusing to consider the correctness of the Ohio Supreme Court's interpretation of Article IV, §6(B), even though appellants sought such re-examination under the guise that such interpretation was without adequate rationale. The District Court's justification for refraining from such re-examination is founded upon what this Supreme Court has repeatedly held, to wit, that the "authoritative construction of a state constitution rests with the courts of such state, whose decisions are binding on the federal courts." *American Federation of Labor v. Watson,* 327 U.S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946); *Madden v. Commonwealth of Kentucky,* 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1940).

9. Finally, appellants allege that Article IV, §6(B) of the Ohio Constitution creates an unreasonable and arbitrary classification so as to constitute a violation of the equal protection clause of the Fourteenth Amendment. Such claim is not only totally without merit, but again was raised solely in hope that the Federal District Court, and now this Supreme Court, might give a new and different construction of that amendment from the one given by the Supreme Court of the State of Ohio.

10. In dealing specifically with state classifications in fiscal situations, this Court recently summarized the controlling law in *Dandridge v. Williams,* 397 U.S. 491, 29 L. Ed. 2d 534, 91 S. Ct. 1848 (1970). At page 485 of your opinion, the Court stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely

> because the classification made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. The problems of government are practical ones and may justify if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theater Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 336 U.S. 420, 426."

11. Thus, one of the basic principles involved in considering the validity of legislation assailed under equality provisions of the federal and state constitutions is that in the exercise of its power to make classifications for the purpose of enacting laws over matters within its jurisdiction, the state enjoys a wide range of discretion.

In the State of Ohio, those judges specifically mentioned in Article IV, §6(B) are judges of courts *created by the Ohio* Constitution, while municipal judges which are not mentioned therein preside over courts created by the *Ohio Legislature*.

12. If in fact, the Ohio Legislature was to decide to abolish Municipal Courts as well as the office of its judge, for purposes of reorganizing local court structure throughout the State, it could do so. On the other hand, the Ohio Legislature could not abolish those constitutionally created courts specifically mentioned in Article IV, §6(B).

13. Furthermore, the Chief Justice and associate justices of the Ohio Supreme Court are one class and handled

not only by our State Constitution, but also by the legislature as one class (e.g., Ohio Constitution, Article IV, §2; Chapter 2503 O.R.C.). The judges of the Courts of Appeals are another class and they are considered such by both the Ohio Constitution and the legislature (e.g., Ohio Constitution, Article IV, §3; Chapter 2501 O.R.C.).

14. On the other hand, Municipal Court's and therefore their judges are a creature of solely the legislature (Chapter 1901 O.R.C.) and that legislature treats *all* municipal judges under the *same* formula of compensation, for they are considered a separate and distinct class.

15. In order for this Supreme Court to hold that the Equal Protection Clause of the Fourteenth Amendment has been violated, it would necessitate a finding that Article IV, §6(B) cannot under any set of facts be justified. Such a holding would not only ignore 171 years of Ohio history, but would declare that all of our courts and their judges are in the same class, that there exists no distinct levels of our judicial system.

V.

CONCLUSION

It is apparent from the facts at hand, that the issues and questions of law present in this case are extremely narrow, for they involve solely a specific construction given to a particular state constitutional amendment, whose import goes no further than Ohio's state lines, whose impact affects no more than a small class of disgruntled judges within.

Furthermore, it is not appellee's position that judges should not be adequately compensated, for indeed the

State of Ohio has recently raised their respective compensation schedule.

But it is appellees' position that the greatest single factor contributing to our continued freedom and justice in this cherished United States of America is that we are a nation governed by law, rather than by men; that just as we do not give order and form to our society merely upon the decrees of a king, or the whims of an aristocracy, neither do we allow judges, or others in positions of authority, to abridge the Supreme Law of the land. That just as the common citizenry of Ohio are also governed by the state constitution, we unhesitatingly demand that our state judges be governed by the same, as well.

Therefore, in consideration of the foregoing, we respectfully request that the District Court's decisions be affirmed, or in the affirmative, to dismiss the appeal on the grounds that it does not present a substantial federal question.

Respectfully submitted,

LAWRENCE S. HUFFMAN
Prosecuting Attorney
Allen County, Ohio
127-129 North Pierce Street
P. O. Box 546, Lima, Ohio 45802
Telephone: (419) 229-0786
Counsel for Appellee, Richard L. Ditto

APPENDIX A

Section 141.04, Ohio Revised Code

COMPENSATION OF JUDGES

141.04 *Compensation of Judges.*

The annual salaries of the chief justice of the supreme court and of the judges named in this section payable from the state treasury are as follows:

(A) Chief justice of the supreme court, thirty-two thousand dollars;

(B) Judges of the supreme court, thirty thousand dollars;

(C) Judges of the Court of appeals, twenty-eight thousand dollars;

(D) Judges of the court of common pleas, eleven thousand dollars;

(E) Judges of the probate court, eleven thousand dollars.

Neither the chief justice of the supreme court nor any judge of the supreme court or of the court of appeals shall hold any other office of trust or profit under the authority of this state or the United States. (132 v. S 517. Eff. 6-10-68. 130 v. Pt 2, H 14; 128 v 772; 126 v 194; 125 v 107)

APPENDIX B

Section 1901.11, Ohio Revised Code

1901.11 *Compensation of judges.*

Judges designated as part-time judges by section 1901.08 of the Revised Code shall receive as compensation not less than six thousand dollars per annum, as the legislative authority prescribes, and such judges shall be disqualified from the practice of law only as to matters pending or originating in the courts in which they serve during their terms of office.

Judges designated as full-time judges by section 1901.08 of the Revised Code and all judges of territories having a population of more than fifty thousand regardless of designation are subject to section 4705.01 of the Revised Code and shall receive as compensation ten thousand dollars per annum, plus an amount equal to twelve cents per capita for the first forty thousand of the population of the territory in which he resides when elected or appointed, as ascertained by the latest federal census of the United States, ten cents per capita for the population of said territory of more than forty-thousand. The compensation of any municipal judge shall not be more than an amount which is two thousand dollars per annum less than the statutory compensation of a judge of the court of common pleas in the county in which the municipal court is situated, or twenty-three thousand dollars whichever is the smaller amount. The presiding judge of a municipal court shall receive an additional five hundred dollars and the chief justice of a municipal court shall receive an additional one thousand dollars, over and above the salaries paid to any other judge of the same court.

The compensation of municipal judges shall be paid in semi-monthly installments, three-fifths of such amount being payable from the city treasury and two-fifths of such amount being payable from the treasury of the county in which such city is situated. If the territory is located in two or more counties, a total of two-fifths of such amount shall be payable by all of the counties in proportionate shares from the treasury of each of such counties in accordance with the respective populations of that portion of each of the several counties within the jurisdiction of the court. Population is determined by the latest decennial federal census. Notwithstanding any other provision of this section, until the first day of January, 1973, the compensation of all the judges of each municipal court shall not be less than that to which the judges of each court are entitled on the effective date of this act, including any additional compensation prescribed by the legislative authority of such municipality. (132 v. S 517. Eff. 6-10-68. 130 v Pt 2, H 14; 130 v H 266; 129 v 582; 128 v. 601; 127 v 913; 126 v 99; 125 v 168)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION, *et al.*,
Appellants,

—against—

ARTHUR DAVIS, *et al.*,
Appellees.

On Appeal From the United States District Court For the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. *AMICUS CURIAE*

LEONARD J. SCHWARTZ
American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215
614/228-8951
Attorney for
American Civil Liberties Union
of Ohio, Inc.

Of Counsel:
STANLEY K. LAUGHLIN, JR.
American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215
614/228-8951

LOWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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Appellants,

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ARTHUR DAVIS, *et al.*,
Appellees.

On Appeal From the United States District Court For the Northern District of Ohio, Eastern Division

MOTION OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, the American Civil Liberties Union of Ohio, Inc. respectfully moves for leave to file a brief *amicus curiae* in the above entitled case. The attorney for appellant and the attorneys for all appellees, save one, have consented to the filing of the attached brief.[1] The attorney for appellee Richard L. Ditto, Laurence Huggman, orally refused the request for consent.

The American Civil Liberties Union of Ohio, Inc. (ACLUO) is a non-profit corporation, incorporated under the laws of the State of Ohio and dedicated to protecting the constitutional rights of all persons. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts.

[1] The letters of consent have been filed with the Clerk of the Court.

ACLUO has successfully litigated hundreds of suits attacking discriminatory and illegal practices of state, county and municipal authorities affecting the lives and liberties of diverse minority groups. Many times the challenges have rested upon the irreconcilability of the practice of not including a minority group within the benefit conferred by a statute with the spirit and intent of the Fourteenth Amendment to the Constitution of the United States. Often times, this problem of under-inclusion is remedied by the affirmative action of the Court.[2]

Here, appellees seek to narrow the available remedies the Courts will have at their disposal to alleviate violations of the equal protection clause. Since the decision of the Court in this litigation will affect the scope of the Fourteenth Amendment, ACLUO deems it important to bring to the Court's attention some of the implications of the issues presented here.

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[2] *See, e.g., Gomez v. Perez*, 41 U. S. L. W. 4174 (U. S. January 17, 1973) (allowing illegitimate children to obtain child support, along with legitimate children, from their natural fathers); *Robinson v. Johnson*, No. 72-434-G, 41 U. S. L. W. 2364 (D. Mass. January 4, 1973) (allowing conscientious objectors who have served 180 days or more of alternative service to receive veterans' benefits).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION, *et al.*,
Appellants,

—against—

ARTHUR DAVIS, *et al.*,
Appellees.

On Appeal From the United States District Court For the Northern District of Ohio, Eastern Division

BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

This interest of *Amicus Curiae* is set out in the Motion for Leave to File, *supra.*

THE QUESTION PRESENTED

Whether a group of persons within a class who are excluded from receiving benefits conferred by a state upon others in the same class have standing to raise the denial of equal protection of the law.[1]

[1] The question presented by *amicus curiae* is a consolidation of the questions presented by appellants in their jurisdictional statement. Further, it excludes from consideration the question of the denial of equal protection of the law. It is *amicus curiae's* belief that this issue need not be reached since, as will be shown under Argument, the lower court did not reach the question. Hence, if standing is present, the Court should simply reverse and remand the case to the district court for resolution of the additional issue.

STATEMENT OF THE CASE

In May, 1968, the people of Ohio adopted a revised Article IV of the Constitution of the State of Ohio, a comprehensive amendment which reorganized and modernized the judicial system of Ohio. The amendment, known as the "Modern Courts Amendment", provides, in part, as follows:

> "The judges of the Supreme Court, Court of Appeals and of the Courts of Common Pleas shall . . . receive . . . compensation . . . which shall not be diminished during their term of office . . ."

Article IV, §6(B) of the Ohio Constitution. Until March 11, 1972, when the Ohio Supreme Court ruled in *Ex rel Wallace, Judge, Celina Municipal Court v. City of Celina*, 20 Ohio St. 2d 109, 279 N.E.2d 866 (1972), most observers believed that the implied exemption in Article IV, §6(B) to the restriction imposed by Article II, 20 of the Ohio Constitution,[2] which does not allow any increase in salary during a judge's existing term of office, included municipal judges.

The Supreme Court of Ohio construed Article IV, to be applicable in all respects to municipal court judges with the sole exception of the exemption from Article II, §20. 20 Ohio St.2d at 113, 279 N.E.2d at 869.

The district court refused to entertain appellants challenge to this constitutional anomaly on the ground that since invalidating Article IV, §6(B) would result in precluding all Ohio Judges from receiving raises of salary rather than municipal judges receiving increases,

---

[2] Article II, §20 of the Constitution of the State of Ohio, reads, *inter alia*, as follows:
"The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of officers; but no change therein shall affect the salary of any officer during his existing term unless the office be abolished."

plaintiffs lacked standing to raise the equal protection argument.[3]

Argument

Where State Laws Are Defective Because of Underinclusion, the Reviewing Court Can Fashion Viable Remedies.

The district court reasoned that plaintiffs could not attack Article IV, §6(B) as denying them equal protection under the laws since even if the exemption was found to violate the Fourteenth Amendment to the United States Constitution, the Court would be powerless to remedy the situation. This inability to grant to plaintiffs the relief sought, according to the court below, required the dismissal of the complaint "without the necessity of deciding the constitutional issue".[4]

What the district court failed to realize is that "[w]here a statute is defective because of underinclusion there exists two remedial alternatives . . ." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., Concurring). Mr. Justice Harlan pointed out that a court might declare the statute a nullity or it may, in some circumstances, extend it to "include those who are aggrieved by exclusion". 398 U.S. at 361-62; *cf., Skinner v. Oklahoma*, 316 U.S. 535 (1942).

The problem, then, with the decision of the district court is that the court was not without a remedy which

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[3] Although the Court did not use the word "standing" in its opinion, it is the clear import of the holding. In fact, the decision seems to be something of a hybrid: part failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6); and part "standing".

[4] Accordingly, this Court is presented with the single question of standing and does not need to, and in fact should not, reach the question of whether or not the Ohio laws violate the equal protection clause. For the sake of argument, *amicus curiae* will assume, as did the Court below, that the Ohio constitutional scheme does violate the United States Constitution. If the Court decides that plaintiffs have standing, the case should be remanded to the lower court to decide the ultimate issue.

it could have applied. Certainly there was no "inability to grant to plaintiffs the primary relief sought" since the court had the power to render the Ohio laws constitutional. 398 U.S. at 355-56; *Robinson v. Johnson*, No. 72-434-G, 41 U.S.L.W. 2364, 2365 (D. Mass January 4, 1973).

In order to have justified extending the coverage to include those who were aggrieved by exclusion the district court needed only to decide whether it was more nearly the will of the people of Ohio to eliminate their policy altogether or extend it in order to achieve what was plainly intended. 398 U.S. 355-56. In the case at bar, the intention of the people of the state of Ohio is unquestionable — the now Article IV, §6(B) was summarized for the ballot, in pertinent part, as follows:

> "To Equalize *Judges'* salaries and to allow Increases in compensation during term"
>
> Emphasis added.[5]

Nor does it defeat the court's power to expand Article IV, §6(B) to hold, as did the lower court, that a court, in determining the issues before it is bound to apply the construction applied by the state supreme court. A. 23. Such a holding misconceives the kind of legislative intent which is used to expand a law in order to avoid eliminating it. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of intent, namely whether the law makers would rather have the court discard the law altogether or extend it to include a class not within the statute as written in order to render what the state plainly did intend, constitutional. 398 U.S. at 354. Hence, the interpretation by the state supreme court as to the meaning of the law when passed is irrelevant.

[5] The complete summary of the modern courts amendment as it appeared on the ballot is included herein as Appendix A.

In short, the district court held that persons aggrieved by actions of the state are to go unrectified. We hope that this Court will not allow this absurd result to remain as a bar to relief by persons excluded from benefits conferred by state statute upon others within their class.

This Court and the lower courts have often expanded rather than retracted statutes to preserve equality. *See, e.g., Gomez v. Perez*, 41 U.S.L.W. 4174 (U.S. January 17, 1973); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Robinson v. Johnson*, No. 72-434-G, 41 U.S.L.W. 2364 (D. Mass. January 4, 1973).[6] The district court had an effective remedy and simply erred in holding otherwise.[7] Since its decision was bottomed on this erroneous ruling, the Court should reverse and remand this case to the district court for a determination of the ultimate issue: Are the Ohio municipal judges being denied the equal protection of the laws?

---

[6] It is impossible to reconcile the argument used by the district court here, with the results reached by this Court in both *Gomez* and *Levy*. If the Court could only strike down the state statutes conferring a benefit on legitimate children, the result would have been that all children were excluded from the benefits of the statutes involved and illegitimate children would have gained nothing. Under the rationale of the district court, such a result would have required a dismissal of the *Gomez* and *Levy* cases without deciding the constitutional issues.

[7] The district court could have avoided the problem of how to remedy the underinclusion by focusing its attention on Article II, §20 rather than Article IV, §6(B). If analyzed in this manner, the problem becomes one of overinclusion, not underinclusion. That is, Article II, §20 violates the equal protection clause by including *only* municipal judges. The district court could have enjoined the application of §20 to municipal judges without defeating the sections applicability to other office holders. *United States v. Jackson*, 390 U. S. 570, 585-86 (1968).

Also, the striking down of Article IV, §6 (b) was not, as the district court implies, a useless remedy. Had the Court declared Article IV, §6(b) unconstiutional the state would have been free to adopt a statute which includes all judges.

CONCLUSION

For the foregoing reasons, the Court should note jurisdiction and, after hearing, reverse the United States District Court for the Northern District of Ohio and remand the case for further consideration.

Respectfully submitted,

LEONARD J. SCHWARTZ
American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215
614/228-8951

ATTORNEY FOR *AMICUS CURIAE*
AMERICAN CIVIL LIBERTIES UNION
of OHIO, INC.

Of Counsel:

STANLEY K. LAUGHLIN, JR.
American Civil Liberties Union
of Ohio Foundation, Inc.
203 East Broad Street
Columbus, Ohio 43215

APPENDIX

BALLOT SAMPLE — MAY, 1968

PROPOSED CONSTITUTIONAL AMENDMENT

3 ADMINISTRATION AND ORGANIZATION OF OHIO JUDICIAL SYSTEM

(Proposed by Resolution of the General Assembly of Ohio)
A majority affirmative vote is necessary for passage.

YES	SHALL THE CONSTITUTION OF THE STATE OF OHIO BE AMENDED BY AMENDING SECTIONS 1 AND 2, ENACTING SECTIONS 3, 4, 5 AND 6 AND REPEALING EXISTING SECTIONS 3, 4, 5, 7, 8, 10, 12 AND 14 OF ARTICLE IV AND BY REPEALING SECTIONS 12 AND 13 OF ARTICLE 11 AS ADOPTED IN 1851 TO PROVIDE THAT THE SUPREME COURT SHALL DECIDE ALL CASES BY MAJORITY VOTE, TO FIX THE POWER OF THE SUPREME COURT OF OHIO TO EXERCISE ADMINISTRATIVE SUPERVISION OVER ALL COURTS AND TO MAKE RULES OF PRACTICE AND PROCEDURE, TO PROHIBIT THE ELECTION OR APPOINTMENT TO ANY JUDICIAL OFFICE OF A PERSON WHO SHALL HAVE PASSED THE AGE OF 70 YEARS, TO EQUALIZE JUDGES' SALARIES AND TO ALLOW INCREASES IN COMPENSATION DURING TERM, TO REMOVE THE PROBATE COURT AS A CONSTITUTIONAL COURT AND TO AUTHORIZE THE CONSOLIDATION OF COUNTY PROBATE COURTS AND COURTS OF COMMON PLEAS? *
NO	

* Emphasis added.

APPENDIX A

FILE COPY

Supreme Court, U.S.
FILE
FEB 21 19
MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION, ET AL.,
Appellants,

v.

ARTHUR DAVIS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS V. MARTIN
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
(614) 469-2872

ATTORNEYS FOR APPELLEE
JOSEPH T. FERGUSON, AUDITOR
OF OHIO

In the
Supreme Court of the United States

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No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION, ET AL.,
Appellants,

v.

ARTHUR DAVIS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

MOTION TO DISMISS OR AFFIRM

Appellee Joseph T. Ferguson, Auditor of Ohio, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the District Court on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

State Constitutional Provisions

Section 6(b) of Article IV is set forth in the Jurisdictional Statement. The following sections of the Ohio Constitution are also involved:

Section 20, Article II:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Section 1, Article IV:

"The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, and such other courts inferior to the supreme court as may from time to time be established by law.

Statement of the Case

Section 20 of Article II of the Ohio Constitution prohibits a public official from receiving an increase in salary during his term in office. This Section provides as follows:

"The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

The people of Ohio by referendum vote adopted a limited exception to the above prohibition. Effective May 7, 1968, Article IV of the Ohio Constitution was amended. Section 6(b) of Article IV, as amended, provides in pertinent part as follows:

"The judges of the supreme court, courts of appeals, and of the courts of common pleas, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office."

Section 1901.11 of the Ohio Revised Code was amended effective June 10, 1968. This amendment increased the compensation of municipal court judges. Malcolm P. Wallace, a municipal court judge, filed for a writ of mandamus in the State Court of Appeals seeking an or-

der that he be paid the increased compensation during his existing term in office. He claimed that Section 6(b) of Article IV, *supra*, excluded him from the prohibition of Section 20 of Article II, *supra*. The Court of Appeals denied the writ.

On appeal, the Supreme Court of Ohio held that under Section 20 of Article II, *supra*, the salary of a municipal court judge could not be increased during term. *State ex rel. Wallace* v. *Celina*, 29 Ohio St. 2d 109 (1972). It also held that the language of Section 6(b), *supra*, did not include and did not apply to municipal court judges. The Court stated that the equal protection argument did not appear in the record below. It was therefore not required to pass upon that issue. However, the Court explained that there were sufficient differences between the courts enumerated in Section 6(b), *supra*, and the municipal court to authorize their separate classification.

Appellants then instituted action in the Federal District Court alleging that Section 6(b), *supra*, denied municipal court judges the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States. Appellants did not challenge the validity of Section 20 of Article II, *supra*. Judge Green, at the request of appellants, granted a temporary restraining order which in effect required that municipal court judges be compensated at a rate which included increases in salary within term.

A three-judge court was convened and decided this cause on its merits. The Court found that the actions of the Auditor in directing that municipal court judges be denied an increased salary within their term were proper. It therefore dissolved the temporary restraining order and dismissed the complaint. A copy of the Opinion and Order is contained in the Jurisdictional Statement. The Court in its opinion stated that the Supreme Court of Ohio had already

determined that Section 6(b), *supra*, did not include or apply to municipal court judges. The construction placed upon this Section by the Ohio Supreme Court was binding on the Federal courts. The Court held that even if Section 6(b) were found unconstitutional, appellants would not be entitled to the relief which they requested. Section 20 of Article II, *supra*, would still prohibit a municipal court judge from receiving an increase in salary during his existing term.

Argument

The decision of the District Court does not present any federal questions for review. In effect, the Court found that even if all of the contentions of appellants were correct, they would not be entitled to the primary relief sought. Section 20 of Article II, *supra*, prohibits municipal court judges from receiving an increase in salary within term. Appellants did not challenge the validity of this section. Instead, they claimed that Section 6(b) of Article IV, *supra*, was unconstitutional. Whether or not this section is valid has no bearing on whether appellants are entitled to increases in salary within term. It merely excludes from the prohibition of Section 20 of Article II, *supra*, justices of the Supreme Court and judges of the courts of appeals and courts of common pleas. The Court properly found that even if Section 6(b) were unconstitutional, it would still be unable to grant to appellants increases in salary within term. Appellants would still be subject to the prohibition of Section 20 of Article II, *supra*.

The District Court held that it was bound by the construction of Section 6(b) by the Ohio Supreme Court. See, e.g., *Cramp* v. *Bd. of Pub. Inst., Orange Co., Fla.*, 368 U.S. 278, 285, (1961); *Kingsley Intl. Picture Corp.* v. *Regents*, 360 U.S. 684, 688 (1959). The cases cited in the Jurisdictional Statement and in the amicus brief are not applicable under the circumstances involved herein. *Welsh* v. *United*

States, 398 U.S. 333 (1970) and *Robinson* v. *Johnson*, ... F.Supp. ....., 41 U.S.L.W. 2364 (D. Mass. 1973) involved federal statutes. The review by a federal court of a federal statute is different from its review of a state statute. This Court explained the difference in *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 369-370 (1971). When the validity of a federal statute is challenged on constitutional grounds, a federal court will ascertain whether any construction of the statute is possible which will avoid the constitutional question. However, a federal court may not so construe a state statute. State courts are the final authority on the construction of state law. See, also, *Gooding* v. *Wilson*, ... U.S. ....., 92 S.Ct. 1103, 1105, (1972).

Gomez v. *Perez*, ... U.S. ....., 93 S.Ct. 872 (1973) and *Levy* v. *Louisiana*, 391 U.S. 68 (1968) came to the Supreme Court from state courts. In neither case did the Court substitute its construction of the statute for that of the state. The Court in both cases merely held that the statute as construed by the state court was unconstitutional.

Although the District Court did not reach the issue, the classification involved herein is clearly permissible under the criteria established by this Court. The classification does not employ a suspect criterion such as race. Neither does it infringe upon a constitutionally protected interest such as the right to privacy or the right to travel. The classification must therefore be upheld unless no state of facts reasonably may be conceived to justify it. See, e.g., *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

As the Supreme Court of Ohio explained in its opinion, there are sufficient distinctions between municipal court judges and the judges enumerated in Section 6(b), *supra*, to justify separate classifications (29 Ohio St. 2d at 113-114). One obvious difference is the fact that the courts

enumerated in Section 6(b) are specifically established by the Constitution. See Section 1 of Article IV, Ohio Constitution. Municipal courts, as well as county courts, mayors courts and police courts, are created by statute. The power of the General Assembly with regard to constitutional courts is limited. These courts cannot be created or abolished by the legislature. With regard to statutory courts, however, there are no such limitations. The General Assembly might therefore abolish such courts, including municipal courts, at any time.

Appellants' objection to Section 6(b), *supra*, is that it is not broad enough. This is not a sufficient basis to find the provision unconstitutional. In similar situations this Court has held that a state may proceed one step at a time and need not "strike at all evils at the same time." *McDonald* v. *Bd. of Elec. Comrs.*, 394 U.S. 802, 811 (1969); *Schilb* v. *Kuebel*, 404 U.S. 357, 364 (1971).

WHEREFORE, Appellee respectfully submits that the decision of the District Court is clearly correct and that the questions upon which this cause depend are so unsubstantial as not to need further argument. Appellee respectfully moves the Court to dismiss this appeal or in the alternative to affirm the judgment entered in the cause by the District Court.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS V. MARTIN
Assistant Attorney General
State House Annex
Columbus, Ohio 43215
(614) 469-2872

ATTORNEYS FOR APPELLEE
JOSEPH T. FERGUSON
AUDITOR OF STATE

FILED SEP
APR 17
MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION
and ROBERT F. NICCUM,
Appellants,

vs.

ARTHUR DAVIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETITION FOR REHEARING

JONATHAN S. ROCKER, ESQ.
REDDY & ROCKER
1101 Euclid Avenue
Cleveland, Ohio 44115
(216) 696-3727

JACK M. SCHULMAN, ESQ.
SCHULMAN & SCHULMAN
730 Standard Building
Cleveland, Ohio 44113
(216) 621-0580

Counsel for Appellants

THE CATTS LEGAL PUBLISHING CO. CLEVELAND, OHIO—TEL. (216) 861-0847

In the Supreme Court of the United States

October Term, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION
and ROBERT F. NICCUM,
Appellants,

vs.

ARTHUR DAVIS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PETITION FOR REHEARING

1. This Court on March 26, 1973 rendered its judgment on an appeal from the United States District Court for the Northern District of Ohio.

2. The judgment of the District Court was affirmed, but, as stated in this Court's judgment, upon grounds other than those upon which the lower court's holding was based.

3. No exposition nor statement appeared in this Court's judgment as to the other grounds upon which its judgment was based.

4. Appellants are placed, therefore, in a most disadvantageous position in formulating this Petition for Rehearing and are compelled to assume from the facts brought to the attention of this Court that a legislative body does no violence to the Fourteenth Amendment to the Constitution of the United States when it classifies any single segment of the judiciary and such classification bears no reasonable, rational basis.

5. Appellants have never proposed that the various levels of a judicial system of a State or of the United States may not be classified and that such classifications may result in variations in compensation, working conditions and a myriad of other differences. It has been appellant's contention, however, that while there may be classifications of various levels of judicial offices when logic, reason, common sense, public policy or any rationale are present, no such classifications are permissible in the absence of such elements and the classification is invidious and arbitrary.

6. The invidiousness of the classification involved in this case now becomes more apparent since the judgment of this Court and gives rise to extremely serious and substantial matters of law affecting the orderly process of judicial administration in every State in the United States, and perhaps in the judicial system of the United States as well.

7. The inescapable logical conclusion and interpretation of this Court's judgment indicates, for example, that a legislative body may arbitrarily discriminate against the judges of the supreme court of a State and thereby threaten the independence of such a court as well as tend to destroy the traditional separation of powers of government typical of all States of the United States.

8. In this particular case it is the judges of municipal courts who suffer from discriminatory legislation, tomorrow it is now possible for a legislative body to select another branch of the judiciary on which to impose sanctions of one kind or another. The most likely judicial branch for such treatment in any state would be the supreme court of the state.

CONCLUSION

Appellants implore this Court to grant this Petition for Rehearing not only for the benefit of the parties herein, but to avoid implications inherent in the Court's per curiam opinion which will, appellants believe, open the door to legislative mischief directed not only toward judicial offices, but all governmental offices. Judges and all public servants are entitled to "equal protection of the laws", no more and no less than any other citizen. We ask for no more and no less.

Respectfully submitted,

JONATHAN S. ROCKER
JACK M. SCHULMAN
Counsel for Appellants

CERTIFICATE OF COUNSEL

I, Jonathan S. Rocker, one of the counsel for appellants do hereby certify that the within Petition for Rehearing is presented in good faith and not for the purpose of delay.

JONATHAN S. ROCKER
Member of the Bar of the United States Supreme Court

OHIO MUNICIPAL JUDGES ASSN. ET AL. *v.* DAVIS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

No. 72–1010. Decided March 26, 1973

Appellants' challenge to state constitutional provision, which District Court dismissed for inability to grant relief sought, *held* to be without merit.

Affirmed.

PER CURIAM.

The motion of American Civil Liberties Union of Ohio, Inc., for leave to file a brief, as *amicus curiae*, is granted.

On the ground that it was beyond its authority to grant the primary relief sought, the United States District Court dismissed appellants' suit which alleged that Art. IV, § 6 (B), of the Ohio Constitution denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution. The judgment is affirmed, but on the ground that appellants' constitutional challenge to Art. IV, § 6 (B), was without merit.

So ordered.